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IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES,

WEST DISTRICT-UNLIMITED

THE APARTMENT ASSOCIATION OF LOS ANGELES COUNTY, INC. dba APARTMENT ASSOCIATION OF GREATER LOS ANGELES, A California Corporation; DAVID MCKELLAR, an individual; LEO and DAGMAR CASTIGLIONE, individuals; GUADALUPE RODRIGUEZ, an individual Plaintiffs, vs. CITY OF SANTA MONICA, A Municipal Corporation, Defendants.	Case No.: SC124308 INTERVENERS-DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF. [Filed concurrently with: Separate Statement; Declarations of Barbara Collins, Gary Rhoades, Denise McGranahan, Rosie Tighe, Sonjia Sheffield, Stephanie Keys, Lily Vickson, and Leah Simon-Weisberg; Request for Judicial Notice; [Proposed] Order]. Hearing Date: October 7, 2016 Time: 8:30 a.m. Dep't: WE "O" Judge: Honorable Lisa Hart Cole

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on October 7, 2016, or as soon thereafter as this matter may be heard in Department WE "O" of the above-entitled Court, located at 1725 Main Street, Santa Monica, California 90401, Intervenors-Defendants Sonjia Sheffield, Stephanie Keys and Tenants Together will move for summary judgment of the Plaintiffs' Complaint, or, in the alternative, summary adjudication of the claims that the ordinance, amending Section 4.28.030 of the Santa Monica Municipal Code (SMMC), prohibiting discrimination against people who use rental subsidy vouchers, is invalid because it is allegedly preempted by the Fair Housing and Employment Act (FEHA), violates the California and Federal Constitutions' prohibitions on impairment of contract and the Federal constitutional right to contract.

This motion for summary judgment, or in the alternative, motion for summary adjudication is brought pursuant to California Code of Civil Procedure (CCP) § 437c and California Rule of Court (CRC) 3.1350 on the grounds that Plaintiffs' claims have no merit since one or more of the elements cannot be separately established. Since there are no issues of material fact, Intervenors-Defendants are entitled to summary judgment. In the alternative, Intervenors-Defendants seek summary adjudication on the following five Issues:

Issue 1: California's Fair Employment and Housing Act Does Not Preempt the Ordinance.

Issue 2 : The 14th Amendment of the U.S. Constitution Does Not Invalidate the Ordinance.

Issue 3: The U.S. Constitution's Contracts Clause Does Not Invalidate the Ordinance.

Issue 4: The California Constitution's Contracts Clause Does Not Invalidate the Ordinance.

Issue 5: The Ordinance is a Valid Exercise of the City's Police Power.

This motion is based upon this Notice of Motion and Motion for Summary Judgment, or in the Alternative, Summary Adjudication, the accompanying Memorandum of Points and Authorities, the Separate Statement, the concurrently-filed Declarations of Barbara Collins, Gary Rhoades, Denise McGranahan, Rosie Tighe, Sonjia Sheffield, Stephanie Keys, Lily Vickson, and Leah Simon-Weisberg; the exhibits separately filed, the pleadings, records and files in this matter, all matters of which judicial notice may be properly requested and taken, the arguments of counsel, and on such other and further material as may be received by this Court at the time of

the hearing.

Dated: July 22, 2016

By: LEGAL AID FOUNDATION OF LOS ANGELES

Denise McGranahan
Attorneys for Interveners-Defendants

WESTERN CENTER ON LAW LAW AND POVERTY

By: Navneet K. Grewal

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As part of a comprehensive plan to address the city's severe affordable housing crisis, the City of Santa Monica passed Ordinance No. 2485 ("Ordinance") prohibiting landlords from denying housing to tenants based on source of income, including section 8 vouchers and other rent subsidies. Separate Statement of Undisputed Material Facts (SSUMF) 1, 25. This Ordinance is especially crucial at a time when, between November 2013 and December 2015, only 48 of the 158 families participating in the Housing Choice Voucher program who were looking for housing were able to locate landlords who would accept their voucher. Declaration of Barbara Collins (Collins Decl.) at ¶12, Exhibit (Exh) 15. Of great concern is the fact that the City of Santa Monica's voucher utilization rate markedly declined from 2011 when 94.96% of the city's allocated vouchers (1092) were being utilized to 2015, when just 87.64% were being used. Declaration of Denise McGranahan (McGranahan Decl.) ¶ 20. Like Intervenor Sonjia Sheffield, many of these participants have contacted over 50 landlords, most of whom simply say "No Section 8." The Ordinance would give those individuals an opportunity to have their tenancy applications judged based on their suitability for tenancy, instead of being automatically rejected just because they are voucher-holders.

In response to the Ordinance, the Apartment Association of Greater Los Angeles (AAGLA) and a group of landlords filed this lawsuit. Contrary to their allegations, the Fair Employment and Housing Act (FEHA) does not preempt the Ordinance. First, the plain language of FEHA only preempts local ordinances that duplicate the provisions contained within its purview. Because FEHA does not protect voucher-holders, local ordinances doing so are not preempted. Second, even if FEHA preempted the entire field of housing discrimination, the fact that Santa Monica passed the Ordinance as a response to an affordable housing crisis takes it out of that field. Third, FEHA expressly allows for local governments to implement the Unruh Act, which prohibits arbitrary discrimination on the basis of personal characteristics. Refusal to rent to voucher holders is refusal to rent to persons because of their personal characteristics. Further, because the federal and state constitutional prohibitions against impairment of contract only apply when there is a substantial unjustified impairment of existing contracts; those arguments must also fail.

Finally, the argument that the 14th amendment creates a broad freedom to contract was rejected by the Supreme Court and must be rejected here.

II. FACTUAL BACKGROUND

The City of Santa Monica is in the throes of an affordable housing crisis: In 1998, approximately 60 percent of the total housing supply in Santa Monica was affordable to low and moderate-income households; by 2014, the proportion of affordable housing had fallen to approximately one-third. Declaration of Gary Rhoades (Rhoades Decl.) ¶¶ 11, 14, Exhs 11, 14; Collins Decl. ¶12.) The crisis has a deep impact on Section 8 Housing Choice Voucher program participants. *Id.* at ¶¶ 5, 12, 13, 14, Exh.15; SSUMF 9, 11, 15-19; Declaration of Rose Tighe (Tighe Decl.), Exh. 33B, Expert Report of Dr. J. Rosie Tighe (Tighe Report) at 3. While the Section 8 voucher program, and others like it, can mean the difference between quality housing and homelessness for its program participants, many landlords are unwilling to accept the subsidy. Accordingly, the City enacted the Ordinance prohibiting discrimination against people who use rental subsidy vouchers. SSUMF 1, 23.

A. How the Housing Choice Voucher Program Works

Congress created the Housing Choice Voucher Program (commonly referred to as Section 8) "[f]or the purpose of aiding low-income families in obtaining a decent place to live". 42 U.S.C. § 1437f(a). The program has since become the largest federal program to assist the country's neediest families, paying a substantial portion of the rent for more than 5 million people in 2.1 million low-income households. McGranahan Decl. ¶ 18, Exh. 31.

"Families (or individuals) who wish to receive housing vouchers must apply with their local [public housing authority], which is responsible for screening prospective participants for federal eligibility, issuing vouchers, and contracting with landlords who lease to Section 8 Program participants." *Austin Apt. Ass'n v. City of Austin* (W.D. Tex. 2015) 89 F.Supp.3d 886, 889-90. Immediate participation in the program is not possible. Wait lists are closed for long periods of time. Even if a family is lucky enough to get on the Section 8 wait list, it often must endure long periods until a voucher becomes available. McGranahan Decl. ¶ 17, Exh. 30. In Santa Monica, the waitlist was reopened for only 35

hours in August 2011; in that interval, 33,000 families were added. McGranahan Decl. ¶ 18, Exh. 31. The waitlist has not been reopened since. *Id.* Names are taken from the waitlist as those currently being assisted leave the program or new funds become available. New funds are not received on a regular basis and there is no way to know when funding will be available. *Id.*

Once a family is approved for a voucher, it will pay approximately 30-40% of its annual income toward rent and the housing authority will pay the remainder. 42 U.S.C. § 1437f (o) (2) (A) and (o) (3). After receiving a voucher in Santa Monica, a family generally must find, within 150 days, a landlord in the private market willing to lease to it, or the voucher will expire. *See* 24 C.F.R. § 982.302(a). Thus, pitted against the clock, low-income Santa Monicans find losing their chance of receiving Section 8 assistance is entirely at the mercy of landlords.

For those who do manage to find a landlord, the process is simple. They notify the housing authority that they have found a unit. The housing authority inspects every two years to ensure that the unit meets housing quality standards that are no more onerous than what is already required by building, health, and safety codes. Collins Decl. ¶ 7-8. If the unit passes inspection, the housing authority then executes a contract with the landlord to ensure payment and compliance with federal regulations. *Id.* at 6. The contract requirements are basic and streamlined. The property owner is required to enter into a Housing Assistance Program (HAP) contract at the time that the lease agreement commences. *Id.* The HAP contract contains basic terms: it identifies the specific address and apartment, contract term, the amount the Housing Authority will pay monthly, the amount the tenant will pay monthly, and the utilities that the owner and tenant are respectively responsible for. *Id.* The housing authority then directly pays the landlord a portion of the rent on a monthly basis. 24 CFR §§982.505; 982.514(a); Collins Decl. ¶ 6.

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B. On May 12, 2015 Santa Monica Enacted An Ordinance To Address The Deep Impact Of The Affordable Housing Crisis On Section 8 Voucher-Holders.

Santa Monica has a long history of supporting affordable housing. As "[m]arket rate rents have skyrocketed, vacancy rates [have become] extremely low, and rental voucher holders from the Santa Monica Housing Authority (SMHA) [have] struggl[ed] to find places to live in [the] community," the City has taken multiple steps to address the crisis. Collins Decl. 5, Exh. 15.

The City has employed several strategies since 2014 to try to ameliorate the affordable housing crisis. SSUMF 1-4, 26-29; Tighe Decl. at ¶ 3, Exh. 33B, Tighe Report at 2-5; Rhoades Decl. at ¶¶ 2,-7 Exhs. 2-7; Collins Decl. at 12, 14, Exh 15. The City's affordable housing strategies are "complemented by the City's rental assistance programs" whose "[h]ouseholds . . . are typically at the lowest end of the economic spectrum, with average incomes of less than $1,000 per month, who would otherwise be unable to access any housing in Santa Monica...." SSUMF 24; Rhoades Decl. ¶ 11, Exh. 11 at 7.

As part of its multi-prong affordable housing strategy, the City Council requested that the staff prepare an ordinance or other means by which to ensure that Section 8 voucher holders could utilize their subsidies. Specifically, one councilmember stated: "We have people living in rental units who actually have vouchers and aren't able to use them. . . .We think that our Section 8 vouchers should be able to be used in Santa Monica." SSUMF 5. Another councilmember remarked: "I know it's more discretionary than rent control, but I think sometimes what happens is people will purchase buildings that have Section 8 tenants in them, and then make an effort to try and get rid of those tenants." SSUMF 6.

On May 5, 2016, City staff returned to Council with a proposed Ordinance prohibiting discrimination against people who use rental subsidy vouchers. SSUMF at 5; Rhoades Decl. at ¶ 7-9, Exhs. 7-9. In the Council Report for the May 5, 2016 council meeting, staff informed the council that many individuals reported to the City that some local landlords refuse to rent to voucher holders, either in particular cases or even as a business practice, and that these reports are consistent with Housing staff's observations that Section 8 tenants experience disproportionate problems finding homes in Santa Monica. SSUMF 14, 17, 18, 22;; Rhoades Decl. ¶ 6, Exh. 6. Consequently, many of the low-income individuals who participate in housing voucher programs are particularly harmed by the affordability crisis. SSUMF 5-6, 9-11, 14-15, 17-19, 24, 27; Collins Decl. ¶¶ 5, 12, 13, 14, Exh. 15; Tighe Decl., Tighe Report, Exh. 33B at 3. Pursuant to the Council's direction, City staff prepared the Ordinance, which includes several recitals:

> [T]he City of Santa Monica is committed to providing and preserving affordable housing for all segments of the community as a matter of social justice and to preserve diversity; and
>
> [T]he City of Santa Monica Housing Authority, which administers the

Section 8 program, reports a shortage of landlords participating in the Section 8 program; and

[T]his shortage may reflect discrimination against the holders of Section 8 vouchers; and

[D]iscrimination against Section 8 voucher holders significantly reduces the pool of housing that is available to them; and . . . "[I]n order to fulfill its commitment to fair and affordable housing opportunities and to fulfill its legal obligations, it is necessary to prohibit housing discrimination based on source of income....

SSUMF at 8-12.

The City approved the passage of the Ordinance, making it unlawful to discriminate against persons receiving rental subsidy vouchers. SSUMF 1, 23. The City followed the lead of twelve states, nine counties and eighteen cities in the nation, including four California cities that already prohibit discrimination against voucher-holders. [1] SSUMF 21. Recently, a similar ordinance in San Francisco was upheld by a trial court.[2]

Because the Housing Choice Voucher Program is such a critical part of the City's approach to dealing with the affordable housing crisis, on January 11, 2016, the Santa Monica Housing Authority wrote the Department of Housing and Urban Development to request an increase in the dollar value of individual housing choice vouchers, explaining that in the preceding years, "[m]arket rate rents have skyrocketed, vacancy rates are extremely low, and rental voucher holders . . . are struggling to find places to live in our community. With an effective rent of $2,618 per unit across bedroom sizes, the 2014 USC Casden Multifamily Forecast ranked Santa Monica/Marina del Rey as the submarket with the highest

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[1] For an updated list of jurisdictions that already prohibit Section 8 discrimination, see *State, Local, and Federal Laws Barring Source-of-Income Discrimination*, Poverty & Race Research Action Council (PRRAC, Updated May 2016 (Appendix B to *Expanding Choice: Practical Strategies For Building A Successful Housing Mobility Program*), McGranahan Decl. ¶ 14, Exh. 27.

[2] On March 22, 2016, in *City and County of San Francisco v. Lem-Ray,* Case No. CGC-15-548551, a San Francisco Superior Court overruled a demurrer to a complaint filed by the City and County and the California Attorney General against several landlords for refusing to rent to Section 8 voucher holders, in violation of San Francisco Police Code § 20 3304(a)(5). The law was upheld against a challenge that it was preempted by the California Fair Employment and Housing Act. On May 20, 2016, the Superior Court entered a preliminary injunction prohibiting the landlord from denying housing to an individual because they intend to use a Section 8 voucher. McGranahan Decl. ¶ ¶ 12-14, Exhs. 25-27.

average rent in the entire Southern California region...." The request was granted. Collins Decl. at ¶12, Exh. 15.

C. Individuals Struggle To Find And Maintain Housing.

Sonjia Sheffield's, Stephanie Keys', and Lily Vickson's experiences with the voucher program illustrate the need for the Ordinance. See Declarations of Sonjia Sheffield (Sheffield Decl.); Stephanie Keys (Keys Decl.) and Lily Vickson (Vickson Decl.). They are the same types of problems that Tenants Together has heard reported. Declaration of Leah Simon-Weisberg at ¶¶4-5. Ms. Sheffield, an African-American woman, is a domestic violence survivor who has diabetes, osteoarthritis, post-concussive syndrome, a prolapsed bladder, severe muscle spasms, depression, and anxiety. Sheffield Decl. ¶ 2. Until very recently, she lived with her two sons and a live-in aide in a 375 square foot apartment. She searched for two years for a two-bedroom unit in Santa Monica that would better accommodate her family. *Id* .at. ¶ 5. Between April 2014 and July 2016, she contacted approximately 150 landlords. Most told her, "We don't accept Section 8." *Id.* at. ¶ 7. In July 2016, after being on a waitlist for a year, she moved into a two-bedroom apartment in a building which had a limited number of deed-restricted affordable apartments. Her new landlord is required by an agreement with the City to rent to Section 8 tenants. *Id.* at. ¶ 8.

Ms. Keys' story is similar. She is 48 years old and lives with her three children, one of whom has autism. Keys Decl. ¶ 2. She has a Section 8 voucher. *Id.* at ¶ 3. Ms. Keys was working and going to school in Santa Monica in 2013. *Id.* at ¶ 4. After she learned about the strong school programs in Santa Monica for children with disabilities like her son, she began searching for a local landlord who would accept a voucher. After several months, she had been rejected so often that she gave up and moved to Long Beach, and then to Los Angeles. *Id.* at ¶¶ 5-6 . In January 2016, she began searching again in Santa Monica for an apartment with her voucher. She put her name on several waitlists for a three-bedroom apartment, and looked daily, with no success. She is now moving to a substandard three-bedroom apartment in Arcadia, where she can use her voucher. She has no choice but to move there since she was about to lose her voucher, and her home in Los Angeles has had multiple floods and the resulting mold was making her ill. Ms. Keys still hopes to move to Santa Monica one day. *Id.* at *¶ 7.*

The problem of landlords not accepting vouchers also arises for existing tenants in rent-stabilized units. Lily Vickson has lived in the same unit for 22 years, and her rent is $805.84, leaving her n $103.56 per month to live on. Vickson Decl. at ¶¶ 2-3, 5. In February 2016, her building was sold. *Id.* at ¶ 4. In March 2016, Ms. Vickson received a Section 8 voucher and asked her new landlord if he would take the subsidy. *Id.* at ¶ 6. At that time, if the landlord accepted the voucher, the housing authority would permit him to charge up to $1,352 per month, much more than rent control. The landlord turned her down, telling her that he does not accept Section 8, and only wants a tenant w telling her that he does not accept Section 8, and only wants a tenant who can pay the full rent herself ho can pay the full rent herself. *Id.* at ¶ 7. Instead, he tried to offer Ms. Vickson money to move. *Id.* at ¶ 8. In June 2016, the SMHA got authority from HUD to allow the voucher to be used at a unit that charged up to $1,930 per month. *Id.* at ¶ 10; Collins Decl. at ¶ 12. Even though the landlord could receive more than double the rent allowed under the City's rent control law, he continued to refuse to accept a rental subsidy. Vickson Decl. at ¶ 10-13. The landlord's reason for refusing Ms. Vickson's voucher is arbitrary—that he simply doesn't accept Section 8. Any alleged increased cost of accepting Section 8 would, no doubt, be more than offset by receiving $1,124 per month more in rent. Ms. Vickson's situation is demonstrative of the extraordinarily trouble SMHA has had in getting its voucher program to function without an enforceable Ordinance.

III. ARGUMENT

A. Summary Judgment Or Adjudication Is Appropriate Because Plaintiffs' Causes Of Action Cannot Be Established.

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CCP § 437c(c). A defendant meets his or her burden of showing that a cause of action has no merit by showing that one or more elements of the cause of action cannot be established, or that there is a complete defense to that cause of action. CCP § 437c(o);*Barnes v. Black* (1999) 71 Cal.App.4th 1473, 1477. A moving defendant is not required to conclusively negate an element of the plaintiff's cause of action; all that is required is that the defendant show that one or more essential elements of the cause of action cannot be established by the plaintiff. *Skrbina v. Fleming Companies*, (1996) 45 Cal. App. 4th 1353,

1365.

B. FEHA Does Not Preempt The Ordinance.

Article XI, Section 7 of the California Constitution provides that a "city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." AAGLA contends that the Ordinance is preempted because the Fair Employment and Housing Act, Cal. Gov't Code §§ 12933(c) and 12995(p)(1)), occupies the field of housing discrimination law, and excludes housing assistance vouchers from its purview. Complaint at ¶¶ 11-12. But, the Legislature has limited FEHA preemption to local ordinances which duplicate the protected classes found within the statute itself. The Ordinance does not duplicate the provisions of FEHA and is not preempted.

State preemption of local laws occurs "if the local legislation 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.'" *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897 (internal citations omitted). "The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption. . . . .[I]f there is a significant local interest to be served which may differ from one locality to another then the presumption favors the validity of the local ordinance against an attack of state preemption." *Big Creek Lumber Co. v. Cty. of Santa Cruz* (2006) 38 Cal.4th 1139, 1149.

Plaintiffs cannot overcome the presumption against preemption. They do not allege that the Ordinance is preempted either through duplication or contradiction. Indeed, their Complaint acknowledges that housing vouchers are excluded from FEHA's definition of source of income. *See* Complaint at ¶11 (*citing* Gov't Code §12955(p)(l), which states that "source of income' means lawful, verifiable income paid directly to a tenant or paid to a representative of a tenant. For the purposes of this section, a landlord is not considered a representative of a tenant.") Therefore, the Ordinance cannot be duplicative of FEHA. And the Ordinance can, by no means, be construed to contradict FEHA. Thus, AAGLA is left only with an argument that FEHA occupies the entire field of housing discrimination. The plain language of the statute refutes that assertion.

1. FEHA's Express Preemption Clause Applies Only To Those Protected Classes Enumerated In The Statute.

Field preemption occurs when the Legislature has expressly manifested its intent to preempt the field or if it has impliedly done so. *Sherwin-Williams Co. v. City of Los Angeles*, *supra*, 4 Cal. 4th at 898. Here, the Legislature speaks directly to what local ordinances it does preempt – they do not include the type passed by Santa Monica. FEHA states:

> (c) While it is the intention of the Legislature to occupy the field of regulation of discrimination in employment and housing *encompassed by the provisions of this part*, exclusive of all other laws banning discrimination in employment and housing by any city . . ., nothing contained in this part shall be construed, in any manner or way, to limit or restrict the application of Section 51 of the Civil Code.

(Emphasis added.) Cal. Gov't Code § 12993(c).

Courts are split with regard to whether that provision preempts all local ordinances prohibiting housing discrimination or only those that speak to the provisions "encompassed by the provisions" of FEHA. However, the more reasonable interpretation is the one adopted in *Rental Housing Association of Northern Alameda County v. City of Oakland* (2009) 171 Cal.App.4th 741, *i.e.*, FEHA only preempts local ordinances that prohibit discrimination against protected classes covered by FEHA.

In *Rental Housing Association*, a local ordinance prohibited landlords from denying housing to people over age 60. The Court of Appeal held that the ordinance was not preempted by §12993(c) for two reasons: First, the purpose of the ordinance in question was to promote the locality's rent and vacancy control protections and, therefore, the ordinance did not fall under FEHA's purview. *Id.* at 761-762. Second, FEHA only preempts local ordinances that prohibit the types of discrimination covered by the state statute. The court stated: ". . . FEHA preempts only "the field of regulation of discrimination in employment and housing *encompassed by the provisions of [that statute].*" *Id.* at 762, n. 15 (quoting Gov. Code § 12993(c) (italics added by Court of Appeal.) Applying the well-established principle that "[s]tatutes must be interpreted, if possible, to give each word some operative effect," the court reasoned that an interpretation of FEHA that holds that all local anti-discrimination provisions are preempted, even if they target classes of people not protected by FEHA would "deprive the qualification 'encompassed by the provisions of [FEHA]' of any meaning." *Id.*

Indeed, "as the United States Supreme Court has reminded us, "'*each phrase* within [an express preemption provision] limits the universe of [local action] pre-empted by the statute.'" *Big Creek Lumber Co. v. Cnty. of Santa Cruz* (2006) 38 Cal.4th 1139, 1155, (*citing Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 550–551 (italics added by *Big Creek* Court). If the Legislature intended to prohibit all local ordinances relating to housing discrimination, it could have simply ended section 12993 with the phrase "occupy the field of regulation of discrimination in employment and housing" without adding "encompassed by the provisions of this part."

The question then arises: What does "encompassed by the provisions of this part" mean? "Because the statutory language is generally the most reliable indicator of that intent, [courts] look first at the words themselves, giving them their usual and ordinary meaning." *People v. Castillolopez* (2016) 63 Cal.4th 322, 371. The ordinary meaning of "encompass" is "to include (something) as a part." Merriam Webster (available at http://www.merriam-webster.com) A "provision" is "[a] clause in a statute, contract, or other legal instrument." Black's Law Dictionary (10th ed. 2014). What clauses are included within FEHA to prohibit housing discrimination? The statute prohibits housing discrimination "because of the race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information of that person." Gov't Code § 12955. As Plaintiffs themselves acknowledge, voucher holders are not included in any of those protected classes. Complaint at ¶11; *Sabi v. Sterling* (2010) 183 Cal.App.4th 916, 936 (FEHA's definition of source of income excludes Section 8 payments.) Accordingly, given the plain language of Gov't Code § 12993, local ordinances that prohibit discrimination against voucher-holders are not expressly preempted.

To the extent Plaintiffs rely on *Delaney v. Superior Fast Freight* (1993) 14 Cal.App.4th 590, 596–598 to support their contention that FEHA preempts the entire field of housing discrimination, the case lacks reasoning and has been dismissed by subsequent courts. In *Delaney*, an individual who had been fired for threatening to kill his supervisor and other colleagues sued his former employer for discrimination on the basis of sexual orientation. *Id.* at 593. In that case, the court held that Gov't Code §12993 preempted the entire field of employment discrimination, but did not grapple with why Gov't Code §12933 includes the phrase "encompassed by the provisions of this part." *Id.* at 596. The

lack of such an analysis led the court in *Rental Housing Association* to state: "We question the decision in *Delaney* that FEHA preempts local regulation of all forms of employment and housing discrimination, whether or not the FEHA itself applies to the particular basis for the discrimination. This interpretation of the statute deprives the ["encompassed by the provisions of this part"] qualification . . . of any meaning." 171 Cal. App. 4th at 741, 762 n. 15: *See also Citizens for Uniform Laws v. Cty. of Contra Costa* (1991) 233 Cal.App.3d 1468, 1473 (stating that because, at the time, FEHA did not prohibit housing discrimination based on disability, "it is further arguable that FEHA does not occupy the field of housing discrimination based on physical handicap.")

Moreover, the Court's reasoning in *Delaney*, which arose in the employment context, does not apply in the housing context. Instead of focusing on the meaning of each word in Gov't Code §12993, the *Delaney* court analyzed whether employment discrimination is a matter well-suited for statewide regulation, concluding that it was and that having dozens of different ordinances would place too great a burden on employers. *Delaney, supra*, 14 Cal.App.4th at 597-598. That reasoning would not apply in the housing context. Localities across the state have different rules for landlords: Some cities have rent control while others do not; some cities have rent escrow programs while others do not; some cities have eviction protections while others do not. The list could go on. Nor, is the need for voucher protections the same across the state. For example, the voucher utilization rate for 2015 for Santa Monica was 87.64%, whereas it was higher in other local communities such as: Orange County (93.28%), Inglewood (98.6%), Burbank (95.76%), and Los Angeles County (98.43%). McGranahan Decl. ¶ 20. Santa Monica made a finding that the Ordinance helps provide for affordable housing. SSUMF 13, 20. This case is distinguishable from *Delaney*.

2. Even If FEHA Occupies The Field Of Housing Discrimination, The Ordinance Is Not Preempted; It Was Passed To Ensure Access To Affordable Housing.

Even if FEHA occupied the entire field of housing discrimination generally, that would not "resolve the question whether the challenged ordinance is preempted. The pivotal issue is whether the ordinance occupies the same "'field" or "subject matter"' as that regulated by FEHA. If not, there is no preemption." *Citizens for Uniform Laws v. Cty. of Contra Costa, supra*, 233 Cal.App.3d at 1474. "The purpose of FEHA is to protect civil rights." *Id.* In contrast, the primary purpose of the Ordinance is to

promote affordable housing through the utilization of housing vouchers. SSUMF 5, 11-13, 20; Collins Decl. ¶ 13.. Accordingly, because the Ordinance serves a purpose other than civil rights, there is no preemption.

Several cases have held that local anti-discrimination ordinances are not preempted by FEHA because they serve a purpose apart from civil rights. In the first, *Citizens*, the court upheld a county ordinance that prohibited discrimination against persons who have conditions associated with human immunodeficiency virus. The county health department informed the board of supervisors that "high-risk individuals are reluctant to be tested [for HIV] because of their fear that if the test result is positive, it will form a basis for discrimination." *Id.* at 1471. The Court of Appeal concluded that the ordinance was designed to promote public health and restrict the spread of HIV and "the ordinance's public health purpose remove[d] it from the field occupied by the state legislation [FEHA]." *Id.* at 1475. Similarly, when the court in *Rental Housing Association of North Alameda County* considered whether an age discrimination ordinance was preempted by FEHA, it held that because the purpose of the ordinance in question was "to promote the rent and vacancy control objectives," it was not preempted by FEHA. 171 Cal.App.4th at 761.

As in *Citizens*, the Santa Monica City Council was informed that discrimination against voucher holders was creating an affordable housing problem. SSMUF 5-6, 9-11, 14-15. 17, 19, 24, 27. ("As real estate values have continued to increase and market rents have continued to rise, low income renters have experienced great difficulty locating housing within the City. . . Many voucher holders have reported to Council members that some local landlords refuse to rent to voucher holders, either in particular cases or even as a business practice. These reports are consistent with Housing staff's observations that Section 8 tenants experience disproportionate problems finding homes in Santa Monica.") SSMUF 9, 14, 19.. The testimony provided during the May 5, 2015 council meeting, when the Ordinance was adopted, reflects a similar concern regarding the lack of affordable housing. ("This is a law that ... would help address this affordable housing crisis.") SSMUF 20. The concern for affordable housing is reflected in the recitals of the Ordinance, which state that Santa Monica "is committed to providing and preserving affordable housing for all segments of the community as a matter of social justice and to preserve diversity" and found that "discrimination against Section 8

voucher holders significantly reduces the pool of housing that is available to them." SSUMF at 11.

Moreover, the Ordinance is part of a comprehensive plan undertaken by Santa Monica between August 2014 and June 2016 to increase affordable housing opportunities. SSMUF 1, 2, 4, 7, 12, 23,-24, 26, 28-29; Collins Decl. ¶ 5, 13, 14; Tighe Decl., Exh. 33B, Tighe Report at 2-6. The City strengthened its tenant harassment ordinance, successfully advocated to HUD to increase the dollar values of housing choice vouchers, placed measures on the November 2014 ballot to raise revenue for affordable housing, passed incentive programs for landlord to participate in the Section 8 program, and set aside several hundred thousand dollars to subsidize extremely rent-burdened rent-controlled tenants. SSMUF 1, 2, 4, 7, 13, 24, 26-29; Collins Decl. ¶ 5, 13, 14; Tighe Decl., Exh. 33B, Tighe Report at 2-6; Rhoades Decl. 2-14, Exhs 2-14. Santa Monica enacted the Ordinance as one piece of its herculean effort to combat its affordable housing crisis. "The mere fact that the two sets of legislation employ similar regulatory tools (i.e., proscriptions against certain types of discrimination) does not mean they occupy the same field." *Citizens, supra*, 233 Cal.App.3d at 1475; *see also, Birkenfeld v. City of Berkeley* (1976) 17 Cal. 3d 129, 142 (local charter amendment not preempted where "purpose of preventing exploitation of a housing shortage through excessive rent charges is distinct from the purpose of any state legislation"). Because the primary purpose of the Ordinance is to promote affordable housing, it is not preempted by FEHA.

3. FEHA Does Not Preempt Local Ordinances Since Section 8 Discrimination is Covered By The Unruh Act.

An independent reason to uphold the Ordinance is that it is a valid exercise of the City's ability to enforce the Unruh Act. Government Code §12993's last phrase states, "nothing contained in this part shall be construed, in any manner or way, to limit or restrict the application of Section 51 of the Civil Code." Civil Code section 51, the Unruh Civil Rights Act, protects all persons from all forms of arbitrary discrimination by a business establishment. *In re Cox* (1970) 3 Cal.3d 212, 216–217.

At least one court has held that local anti-discrimination protections are not preempted because the "discrimination prohibited by the ordinance is of the sort prohibited by the Unruh Civil Rights Act . . . and [the Unruh Act] expressly provides: 'Actions under this section shall be independent of any other remedies or procedures that may be available to an aggrieved party.'" *San Jose Country Club Apartments*

v. Cnty. of Santa Clara (1982) 137 Cal.App.3d 948, 952. In that case, the court held that a local ordinance prohibiting discrimination on the basis of "age, parenthood, pregnancy, or presence of a minor child" was not preempted by FEHA. The court reasoned that the Unruh Act states: "'It is the intent of the Legislature that the State of California by the provisions of this act not preempt this area of concern so that other jurisdictions in the state may take actions appropriate to their concerns.' Such a definitive statement of legislative intent leaves no room for the plaintiff's preemption theory." *Id.* at 952. In making its decision, the *San Jose Country Club Apartments* court relied on *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal 3d 721, 744, which held that a landlord who prohibited all children from residing in the complex violated the Unruh Act, which prohibits all stereotypical discrimination by any business.

"With regard to the Unruh Civil Rights Act particularly, [the California Supreme Court] explained that it 'must be construed liberally in order to carry out its purpose' to 'create and preserve a nondiscriminatory environment in California business establishments by 'banishing' or 'eradicating' arbitrary, invidious discrimination by such establishments [*citation*]. The Unruh Civil Rights Act 'serves as a preventive measure, without which it is recognized that businesses might fall into discriminatory practices.'" *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 666 (quoting *Angelucci v. Century Supper Club* (2007) 52 Cal.3d 1142, 1169-75 (internal citation omitted.)

Whether the Unruh Act applies to a particular group of individuals depends on whether the classification is based on a personal characteristic similar to those listed in the statute. *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1169-75. A personal characteristic is "not immutability, since some [established protected classes] are, while others are not, but that they represent traits, conditions, decisions, or choices fundamental to a person's identity, beliefs and self-definition." *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 842-43. Being a voucher holder represents a condition that becomes fundamental to their identity in the eyes of many. Lily Vickson's situation is illustrative. Though the Santa Monica Housing Authority would have allowed her rent to be more than doubled, her new landlord only wanted a tenant who could pay the full rent herself. Vickson Decl. at ¶¶ 6, 10-13.

That people perceive voucher holders as having various personal characteristics is borne out by research. For example, research indicates that "despite being a race-neutral policy, the public associates

subsidized housing with the race of its potential residents. Tighe Decl. ¶ 3, Exh. 33B, Tighe Report at 10. This association of subsidized housing with minorities correlates to lower support for subsidized housing, and greater concern about negative outcomes emanating from the existence of such housing nearby." *Id.* *See also, Cmty. Action League v. City of Palmdale*, 2012 WL 10647285, at *6 (C.D. Cal. Feb. 1, 2012)(Denying a motion to dismiss claims of race discrimination under the federal Fair Housing Act where, among other facts, "[t]he City's mayor ha[d] proudly and repeatedly stated that Lancaster [wa]s at 'war' with Section 8.") "Race, and to a lesser extent, poverty status is strongly linked to negative perceptions of the beneficiaries of social policies, including subsidized housing." Tighe Decl. ¶ 3, Exh. 33B at 11[3] Indeed, the very fact that FEHA prohibits discrimination on the basis of "source of income" (other than vouchers) indicates that receipt of a subsidy is also a personal characteristic. Because discrimination against voucher holders is arbitrary discrimination based on personal characteristics, the Ordinance is not preempted.

C. The Ordinance Does Not Violate The Federal Or State Constitutions

AAGLA alleges that the Ordinance violates the freedom to contract that it claims is found in the 14th Amendment to the U.S. Constitution (Complaint at ¶16) and is an impairment of contracts prohibited by Article I, Section 10 of the U.S. Constitution and Article I, Section 9 of the California Constitution (Complaint at ¶ 15). All three claims should be rejected.

1. The Fourteenth Amendment Does Not Give Landlords Absolute Freedom To Contract Only As They Please

"There is no absolute freedom to do as one wills or to contract as one chooses." *W. Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, 392. The Supreme Court made this statement after having, in several cases, struck down minimum wage laws on the theory that they interfered with a due process freedom to contract. In a sweeping decision, the Court overturned prior law and held that states have broad authority

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[3] Such stereotypes include: People in subsidized housing do not make good neighbors; nearby subsidized housing increases crime, lowers property values; has a negative impact on local schools, changes the character of the community, increases traffic, and is bad for the local economy. *Id.* However, "[f]or the most part, the research demonstrates that well-managed housing that fits the scale of the neighborhood seldom produces negative impacts." *Id.*

to regulate future contracts; invalidating that authority should be the rare exception. The Ordinance is not the rare exception. Indeed, "[i]n the federal context '[t]he traditional view... is that the [Supreme] Court exceeded its legitimate judicial role by reading the right of 'liberty of contract' into the Fourteenth Amendment's Due Process Clause, despite the absence of textual support for this right. . . . [Accordingly], a federal 'liberty of contract' substantive due process claim is . . . a veritable non-starter." *Austin Apartment Ass'n v. City of Austin* (W.D. Tex. 2015) 89 F.Supp.3d 886, 898 (recently upholding a similar ordinance).

In *W. Coast Hotel Co.*, the Court specifically considered whether a state minimum wage law protecting women and children violated the 14th Amendment's due process clause by impinging on a freedom to contract. 300 U.S. at 391-92. A prior decision, *Adkins v. Children's Hospital* (1923) 261 U.S. 525, had on substantially identical facts held that a minimum wage law was unconstitutional. The Court explicitly overturned that case. *Id.* at 400.The Court held that the legislature had the right to consider the plight of women who had little bargaining power and whose work was being exploited, and to devise a policy to address the issue. *Id.* at 398. Only if the Legislature's decision is arbitrary and capricious can a legislative act be found to impermissibly violate a freedom to contract. *Id.* at 399.

Here, Santa Monica has similarly considered the situation of people who use vouchers to pay rent and found a shortage of landlords willing to accept them. SSUMF 35, 39, 41, 41, 44, 47-49, 52. This is a recognition that there is an "unequal bargaining power [between] landlord[s] and tenant[s] resulting from the scarcity of adequate housing in urban areas," *Boston LLC v. Juarez* (2016) 245 Cal.App.4th 75 (*citing Green v. Superior Court* (1974) 10 Cal.3d 616, 625). The City's passage of the Ordinance is not arbitrary and capricious. A Texas federal court rejected the Austin Apartment Association's claim that a source of income ordinance protecting voucher holders violated the 14th amendment; this court should as well. *Austin Apartment Ass'n v. City of Austin, supra*, at 898-99.

2. The Contracts Clause Does Not Invalidate The Ordinance.

Article I, Section 10 of the United States Constitution, states that "[n]o state shall . . . pass [any] law impairing the obligation of contracts." Despite the seemingly expansive language, the U.S. Supreme Court has repeatedly made clear the limited nature of the Contracts Clause: "[I]t is well settled that the

prohibition against impairing the obligations of contracts is not to be read literally." *Keystone Bituminous Coal Ass'n v. DeBenedictis* (1987) 480 U.S. 470, 502-503.

Whether legislation, including municipal ordinances, violates the Contracts Clause requires a three-part inquiry: "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Gen. Motors Corp. v. Romein* (1992) 503 U.S. 181, 186. Meeting that test requires a significant showing that AAGLA cannot meet.

First, the Ordinance primarily applies to *future* contracts. SSUMF 61-62. Ordinance, Rhoades Decl. ¶ 9, Exh. 9. ("It is unlawful to "[r]efuse to rent or lease a housing accommodation....") Where no existing contractual relationship exists, the Contracts Clause is simply inapplicable. *Gen. Motors Corp., supra, 503 U.S. at 186.* Second, for landlords who are currently accepting vouchers as payment for rent and would like to simply refuse to do so anymore, it would be the landlord seeking to extinguish the contractual relationship, not the effect of the Ordinance.

Even assuming *arguendo* that the Ordinance did impair contracts, there is a question of how substantial that impairment is. "As a measure of contractual expectations, one factor to be considered in determining the extent of the impairment is 'whether the industry the complaining party has entered has been regulated in the past.' . . . The next question is whether the state has 'a significant and legitimate public purpose behind the regulation'. . . Finally, we must consider 'whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Kraebel v. New York City Dep't of Hous. Pres. & Dev.* (2d Cir. 1992) 959 F.2d 395, 403. In *Kraebel*, the Second Circuit considered a landlord's challenge to a requirement that it accept a tax abatement in lieu of increased rent. The Court held that because rental of residential property is a heavily regulated industry, the landlord could not "claim surprise that her relationships with certain tenants are affected by governmental action. Furthermore, because the city ultimately reimburses her to the extent that its regulations deny her of her expected rent payments, the impairment cannot be described as being substantial or severe for purposes of the contract clause. Even assuming that the delays and burdens imposed on [the landlord's] receipt of payments can be characterized as severe, there is a legitimate state purpose for the [program prohibiting rent increases for elderly persons], and on balance, we conclude that [the landlord] does not have a

cognizable contract clause claim." *Id.* at 403.

Similarly, here, Santa Monica already heavily regulates the landlord-tenant relationship. SSUMF 90. For example, "just cause" eviction requirements apply to all multi-family properties (Section 8 included), not just those covered by the city's rent control law. McGranahan Decl. ¶¶ 9-10, Exhs. 22-23. Landlords can also be required to pay temporary and permanent relocation to displaced tenants. McGranahan Decl. ¶ 7, Exh. 20. These regulations are in addition to the dozens of requirements and restrictions imposed by state law. (*See e.g.* Civil Code §§ 1940-1954.31.) Neither the housing authority nor the Ordinance require that a landlord rent to a voucher-holder if the rent exceeds the amount that is reasonable or is an amount that exceeds the maximum rent allowed by HUD. Rhoades Decl. ¶ 9, Exh. 9; Collins Decl. ¶ 4.

There are also a number of financial incentives for participating in the Section 8 program in Santa Monica such as a signing bonus of up to $5,000 and loss mitigation in the form of security deposit reimbursement of to $4,000. Collins Decl. ¶ 14; SSUMF 88; Rhoades Decl., Exh. 12. And, finally, there is a legitimate purpose for the program -- to ensure an adequate supply of affordable housing. SSUMF 68-73, 80. No cognizable contract claim can exist. *See also Tarantino v. City of Hornell* (W.D.N.Y. 2009) 615 F.Supp.2d 102, 125 aff'd, (2d Cir. 2010) 378 F.App'x 68 (holding no impairment of contract where city ordinance required landlords to obtain property insurance.)

Further, the Contract Clause "does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected." *Keystone Bituminous Coal Ass'n v. DeBenedictis* (1987) 480 U.S. 470, 503 (holding that legislation that substantially impaired existing contracts between coal companies and landowners was justified and therefore constitutionally valid because it had a strong public interest in preventing environmental harm and legislation achieved that goal in a reasonable manner). Again, Santa Monica passed the Ordinance for the general good of the public.

3. The Ordinance Does Not Violate The California Constitution.

AAGLA's claim that the Ordinance violates the California Constitution, Article I, section 9,

admonishing that a "law impairing the obligation of contracts may not be passed" is also unfounded. A court's analysis regarding whether a municipal ordinance violates the California Constitution's prohibition on impairment of contract "requires a two-step inquiry into: (1) the nature and extent of any contractual obligation ... and (2) the scope of the Legislature's power to modify any such obligation." *Teachers' Retirement Bd. v. Genest* (2007) 154 Cal.App.4th 1012, 1027. Under this analysis, AAGLA's claim fails.

First, as noted above, the Ordinance will primarily apply to contracts entered into in the future. Second, to the extent that it applies to existing contracts, the City was well within its power to simply require that the contract continue on its existing terms, absent a non-discriminatory reason for doing so. "The contract clause and the principle of continuing governmental power are construed in harmony; although not permitting a construction which permits contract repudiation or destruction, the impairment provision does not prevent laws which restrict a party to the gains reasonably to be expected from the contract." *Board of Administration v. Wilson*, 52 Cal.App.4th 1109, 1130-31 (1997). At most, landlords will have to continue receiving rent for their units just as they are already mandated to do because of the city's "just cause" eviction requirements.

Far more onerous restrictions have been upheld in the face of similar challenges. For example, in *Danekas v. San Francisco Residential Rent Stabilization & Arbitration Bd.* (2001) 95 Cal.App.4th 638, the court upheld a rent control board regulation that restricted the ability of landlords to prohibit subletting of leases. The court found that the regulation would retroactively restrict contract rights, but the multifamily rental industry is heavily regulated, the ordinance was reasonably tailored to achieve its goals, and addressing lack of affordable housing constituted an important public purpose. *Id.* at 651-52. In this case, Santa Monica has declared a need for more affordable housing, it has heavily regulated rental properties for decades, and no serious contract rights are impaired. SSUMF 95, 97-103, 114-120. McGranahan Decl. ¶¶ 22, 23, Exhs. 9, 10. The Ordinance is constitutional.

D. The Ordinance Is A Valid Exercise Of Santa Monica's Police Powers

Intervenors-Defendants join in the reasoning set forth in Defendant City of Santa Monica's Motion for Summary Judgment, or in the Alternative, Summary Adjudication regarding the validity of

the City's ability to pass the Ordinance as an exercise of its police powers. The police power is "as broad as the police power exercisable by the Legislature itself." *Birkenfeld, supra,* 17 Cal.3d at 140. There need only be a rational basis for the city's exercise of its police power. *Zahn v. Board of Public Works*, 195 Cal. 497, aff'd, 274 U.S. 325. Courts will not substitute their judgment for that of the city's legislative body unless the regulation is arbitrary. *Simpson v. City of Los Angeles* (1935) 4 Cal.2d 60, 65. The Ordinance is unquestionably a valid and rational exercise of Santa Monica's broad police power pursuant to California Constitution, Art. XI, section 7. SSUMF 121-147.

IV. CONCLUSION

Intervenors-Defendants are entitled to summary judgment, or in the alternative, summary adjudication because Plaintiffs cannot establish the essential elements of their claim that the ordinance is invalid based on any of the following theories: preemption, violation of the federal and California Constitutions, or invalid exercise of police power. For this reason, Intervenors-Defendants respectfully request that this Court grant their motion.

Dated: July 22, 3016

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